No. 88-6025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

REUBEN DOWLING,

Petitioner,

v.

UNITED STATES,

Respondent.

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. The Government Too Lightly Dismisses The Double Jeopardy And Collateral Estoppel Concerns Present In This Case.

1. The Government puts forth several propositions in support of its contention that the provisions of the double jeopardy clause are inapplicable to the admission of prior acquittal evidence. First, in the view of the Government, the introduction of evidence concerning offenses for which a defendant has been acquitted "cannot be described as an attempt to retry him for that offense." (Br. Resp. 11). The Government reasons that since the petitioner was being tried for the robbery of the First Pennsylvania Bank double jeopardy is inapplicable as this is not the "same offense" for which he was acquitted.[1] (Br. Resp. 11). Finally, since petitioner was not being "punished" for the Henry incident, he was therefore not placed in "jeopardy" within the meaning of double jeopardy. (Br. Resp. 24). Arguing from its premise that the introduction of the Henry evidence did not come within the "same offense" and/or "jeopardy" provisions of the double jeopardy clause, the Government contends the policies underlying that protection are inapplicable. (Br. Resp. 24).

2. The Government's argument essentially can be capsuled into a contention that the introduction of the Henry evidence at petitioner's bank robbery trial did not put him in "jeopardy" since he was not being tried for the alleged

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[1] *Ashe* v. *Swenson*, 397 U.S. 436 (1970) would seem to foreclose the "same offense" argument. Further, in one sense petitioner, unlike Ashe, indeed did have to defend the exact same offense for which he had been acquitted.

Henry robbery.[2] Noting the qualitative similarities between the situation presented here and that which attaches when a defendant is being tried for the specific offense, the Courts of Appeal applying collateral estoppel to the evidentiary use of acquitted conduct have rejected the Government's proposed distinction. (Pet. Br. 33-34).

Indeed, since in the view of petitioner he was placed in jeopardy in reference to the Henry incident by introduction of the Henry evidence at the bank robbery trial, it could be argued that the introduction of this evidence deprived the defendant of his Fifth Amendment protection against double jeopardy without resort to collateral estoppel analysis. "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with the criminal prosecution." *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). Double jeopardy not only prohibits double punishment but also prevents the Government from attempting to impose punishment on an individual who has been acquitted. See *Helvering* v. *Mitchell*, 303 U.S. 391 (1938); *United States* v. *Halper*, 109 S.Ct. 1892 (1989). A "criminal punishment" is one normally associated with a criminal proceeding. *United States* v. *Halper, Id.*[3] To "punish" is to "impose a penalty

[2] Whether the petitioner was being "retried" for the Henry offense seems to be a matter of semantics. While the Government contends otherwise, certainly the introduction of the Henry evidence closely resembled being "retried" for that offense. The Government called a witness who accused the petitioner of committing the crime of robbery. The Government asked the jury to accept this evidence as true and to draw inferences of petitioner's guilt of bank robbery based in part on the Henry evidence.

[3] Though such "punishment" may also result from civil proceedings where the penalty is disproportionate to the alleged remedial purpose of the proceeding. *United States* v. *Halper, Id.*

upon some fault, offense, or violation." *Webster's Third New International Dictionary of the English Language Unabridged*, (8th Ed. 1966).

Petitioner suggests that constitutionally the introduction of the Henry evidence in this trial placed him at risk and therefore in jeopardy in regard to the Henry incident.[4] In effect, the defendant had to either once again establish innocence as to the Henry allegation or suffer the consequences that the jury would be allowed to infer petitioner's guilt in regard to the First Pennsylvania robbery because he had been in the Henry residence within a couple weeks of the bank robbery with a mask and a gun in the presence of Delroy Christian. Allowing the jury to draw such an inference from the Henry evidence amounts to the "imposition of a penalty" in reference to the Henry incident. The utilization of this evidence in such a manner in the second criminal trial is as punitive as attempting to impose a disproportionate civil penalty after a prior acquittal. See *United States* v. *Halper, supra*. Certainly, the use of the Henry evidence appears more punitive than remedial. This Court's double jeopardy jurisprudence establishes that any attempt to "punish" in a proceeding subsequent to an acquittal is constitutionally prohibited.[5]

3. The Government cites *Standefer* v. *United States*, 447 U.S. 10 (1980) to support its argument that "the differences between criminal and civil cases weigh in favor of a cautious application of collateral estoppel in the crimi-

[4] The risk to which the jeopardy provision of the double jeopardy clause refers "has long been construed to mean something far broader than its literal language." *Breed* v. *Jones*, 421 U.S. at 528.

[5] This result follows even though a lesser burden of proof may be applicable in the subsequent proceedings. *United States* v. *Halper, supra.*

nal context not a broader application." (Br. Resp. 25). The situation presented in *Standefer*, where this Court held the doctrine of non-mutual collateral estoppel inapplicable to criminal cases, is easily distinguished from that presented here in terms of the core values which double jeopardy protects. Thus, since the defendant in *Standefer* had not been a party in the prior trial he was not being forced to again defend an allegation for which he had been acquitted. It could not fairly be argued that the defendant there was subject to the "embarrassment, expense, and ordeal" associated with a retrial or subject to living in "a continuing state of anxiety and insecurity." See *Green* v. *United States*, 355 U.S. 184,187 (1957). The collateral estoppel concern with protecting litigants from the burden of relitigating issues with the same party was also inapplicable to *Standefer*.

The Government also quotes from *Standefer* to the effect that the public interest in criminal cases mandates "less concern for judicial economy" than that in the civil arena and "to plead crowded dockets as an excuse for *not trying* criminal defendants" is not in the best interest of the criminal justice system. 446 U.S. at 25. (Br. Resp. 26) (emphasis added). While judicial economy is not the linchpin of petitioner's argument and is only one of the many double jeopardy-collateral estoppel considerations present in this case, nevertheless petitioner would note that the public interest expressed by the Court in *Standefer* as weighing more heavily than judicial economy is not present in this case. Here, petitioner does not seek an order that he could not be tried for the bank robbery. Thus, unlike Standefer he does not seek immunity from prosecution; rather, he only seeks to exclude evidence,

citing judicial economy as one of many applicable policy considerations.[6]

II. The Government's Burden Of Proof Argument Fails To Give Adequate Consideration To The Concerns Present When The Second Proceeding Is Criminal.

1. In its response to the petition for writ of certiorari and in its brief on the merits, the Government emphasizes its burden-of-proof argument, contending that collateral estoppel is inapplicable since the burden the Government needed to carry to support admissibility of the Henry evidence in the bank robbery (preponderance) was less than the beyond a reasonable doubt burden which it shouldered in the Henry trial. In support of its argument, the Government cites decisions of this Court holding that an acquittal in a criminal case does not necessarily foreclose subsequent civil penalty or forfeiture proceedings based on the same conduct. The rationale of these cases was based, in part, on the lower standard of proof in the civil proceeding.

2. The Government relies heavily on this Court's decisions in *United States* v. *One Assortment of Eighty-Nine Firearms*, 465 U.S. 354 (1984), *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), and *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), holding that an acquittal in a criminal case does not collaterally estop the Government from later bringing a civil forfeiture or penalty proceeding based on the same facts giving rise to the criminal prosecution. It is true that these decisions were based in part on the lesser burden of proof applica-

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[6] See also Federal Rule of Evidence 403, which provides that relevant evidence, may be excluded, inter alia, for "undue delay or "waste of time."

ble, but the language of the Court clearly indicated that its rulings in these cases could not be severed from the fact that it was considering a subsequent civil proceeding following the acquittal. Thus in *Eighty-Nine Firearms* the Court determined that "the time has come to clarify that neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges." 104 S.Ct. 1099 (1984). In *One Lot Emerald Stones*, it was held that an acquittal "does not constitute an adjudication on the preponderance-of-the evidence burden applicable in civil proceedings." 409 U.S. at 235. See also *Helvering* v. *Mitchell*, 303 U.S. at 397 (acquittal "not a bar to a civil action by the Government remedial in its nature . . ."). These decisions do not sanction the Government's attempt to relitigate an acquitted a defendant's guilt in a subsequent criminal proceeding.

3. In his opening brief petitioner noted that resolution of this case on a strict burden-of-proof analysis would tend to unfairly deprive those innocent defendants who are acquitted of the protections afforded by double jeopardy and raise due process reliability concerns due to the increased risk of conviction based in part on conduct for which the defendant is not guilty. (Br.Pet. 38-39). The Government responds that since the jury is instructed that it must acquit if there is a reasonable doubt, it "is fair to assume that in practice juries rarely reach a collective determination that a defendant is entirely innocent of an offense." (Br. Resp. 16,n.7). The Government does not quarrel with petitioner's assumption that a significant number of acquitted defendants are innocent, but merely states that juries rarely reach such a "collective" conclusion. Whether the Government's observation is empirically correct is irrelevant as the same concerns are

present for the innocent defendant, namely the increased risk of erroneous conviction from having to redefend, whether or not the jury verdict represents a collective finding of innocence. This Court has often imposed a prophylactic rule excluding evidence across-the-board against all defendants in order to protect the rights of the unascertainable few who absent such a rule would be subject to a particular kind of prejudice. For instance, not all defendants are so susceptible to custodial pressure that they are unable to effectively exercise their right against self-incrimination without the assistance of an attorney, yet this Court ruled in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that in-custodial statements taken without giving the suspect the warnings mandated by that case would be excluded from evidence without any inquiry into the particular defendant's knowledge of the right or susceptibility to custodial pressures.[7]

III. The Admission Of Evidence Concerning Acts For Which A Defendant Has Been Tried And Acquitted Involves Considerations Not Present With Other Types Of Evidence.

1. The Government asks the Court to hold petitioner's prior acquittal meaningless in the context of the introduction of the Henry evidence. Thus, the only inquiry should be whether such evidence is relevant. If so, such evidence would be admissible unless it violated a "privilege or other legal right." (Br. Resp. 32). A contrary rule would have the undesirable effect of "establish[ing] a different standard of relevance for this evidence than for any other evidence." (Br. Resp. 18).

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[7] "The Fifth Amendment privilege is so fundamental we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." 384 U.S. at 468.

2. In support of its argument that such evidence should be admissible through a straight-forward application of the relevance provisions of the Federal Rules of Evidence, irrespective of the acquittal, the Government reminds the Court that these Rules "are congressionally mandated directions to the courts that specify the extent to which such evidence is or is not admissible . . ." (Br. Resp. 27). In addition to ignoring the fact that the Federal Rules of Evidence do not speak to the issue of how to treat evidence concerning conduct for which there has been an acquittal, this approach, more importantly, overlooks the basic premise that Congress has no authority to direct the admission of evidence obtained or sought to be admitted in violation of the Constitution of the United States.

3. Similarly, the Government argues that "if evidence meets the test of relevance, and if its admission would not violate a privilege or other legal right", such evidence should be admitted as safeguards exist to protect against prejudice. (Br. Resp. 28, 32). While perhaps true as a general proposition, as applied to this case this argument assumes its own conclusion, for if either the due process or double jeopardy clauses of the Fifth Amendment barred introduction of the Henry evidence then such obviously violates a "privilege or other legal right" in the same sense that otherwise relevant evidence obtained in violation of the Fourth, Fifth or Sixth Amendments is not admissible.

4. Finally, in this same vein, the Government argues that this Court's decision in *Huddleston* v. *United States*, 108 S.Ct. 1496 (1988) rejects the idea that the admission of "other acts" evidence should be justified by a special standard. (Br. Resp. 28). The reliance on *Huddleston* is misplaced as there the Court was not presented with the important concerns that are present when a defendant

has previously been acquitted of the "other acts". None of the usual protections cited in *Huddleston* against prejudice accorded a defendant by the Federal Rules of Evidence when "other acts" evidence is admitted, 108 S.Ct. at 1502, address the double jeopardy or due process concerns raised when a defendant is forced to defend a second time against allegations for which he has previously been tried and acquitted.

IV. The Admission Of The Testimony Of Vena Henry Did Not "Promote The Interest In Fair And Evenhanded Adjudication." (Br. Resp. 37).

1. The Government responds to petitioner's due process arguments by contending that the result sought by petitioner "would undercut, rather than advance, the reliability of fact-finding" (Br. Resp. 12), inconsistency in jury verdicts is a "fact of life" in the criminal justice system (Br. Resp. 34), and exclusion of evidence concerning an acquitted crime does not "occup[y] any place in the traditions of fairness that have grown up around a criminal trial." (Br. Resp. 37).

2. The Government's argument that exclusion of acquitted conduct evidence on due process grounds would "undercut" reliable fact-finding in those situations where a "careful review" of the record shows an acquittal on a ground other than that in issue ignores the fact that due to the numerous, often unarticulated, bases which may explain a jury's verdict, the reliability of attempting such a determination may itself be an unreliable procedure. Petitioner's proposed rule that such evidence would not be barred where examination of the record of the first trial shows petitioner or his agent made an admission of the fact sought to be proven by the disputed evidence draws an appropriate compromise between the reliability con-

cerns of the defendant in not having to defend against allegations of which he has been acquitted and those of the Government in not having evidence excluded which has no reasonable relationship to the fact of the acquittal. (Br. Pet. 23-24).

3. Contrary to the Government's suggestion, this Court has not always held that the ability to cross-examine and introduce "countervailing evidence" is sufficient to "resolve doubts about reliability" especially where other important policies must be weighed. (Br. Resp. 32). For instance, doubts concerning the reliability of an involuntary confession mandate the exclusion of such evidence even though the defendant could still cross-examine and introduce independent evidence in an attempt to establish the actual unreliability of the statement. See *Rogers* v. *Richmond*, 365 U.S. 534, 545 (1960). Here, the Government's repeated references to petitioner's ability to "submit countervailing evidence", "to argue against the inferences", "to challenge [the evidence] by any appropriate means" or to "show the evidence was either false or insignificant" (Br. Resp. 34-35), all ignore the reality that these aphorisms are simply shorthand for saying petitioner, though acquitted, must again defend the same allegations in a subsequent *criminal* trial.

4. In responding to petitioner's argument that the introduction of acquitted conduct evidence raises reliability concerns similar to those expressed by this Court's decisions in the counselless conviction cases, (Pet. Br. 18-19), the Government seeks to have the Court, in effect, adopt a rule that a conviction in a prior trial has legal significance in a latter trial while an acquittal does not. Thus, according to the Government's reasoning, the real distinction between the situation presented here and the counselless conviction cases is that in the latter the

conviction is "conclusive as to the fact of the conviction" while in the former the defendant has an "opportunity to prove that he did not commit the offense." (Br. Resp. 32). This purported distinction overlooks the very concerns present in the acquitted conduct situation, namely that the defendant not have to again redefend and thus face the hazards double jeopardy is designed to prevent. Like the defendant given an "opportunity" to convince the jury that his involuntary confession is indeed unreliable, it would be little solace to a defendant to know he will again be given an "opportunity" to defend.

V. The Admission Of The Henry Evidence Was Not Harmless Beyond A Reasonable Doubt.

1. In his opening brief, petitioner, while recognizing this Court's power to undertake the harmless error analysis of the record, suggested that if the Court determines that the admission of the Henry evidence was constitutional error, it may want to remand this case to the Court of Appeals for such determination. In light of this position petitioner did not address in detail the actual issue of whether the admission of the Henry evidence was harmless beyond a reasonable doubt as required by *Chapman* v. *California*, 386 U.S. 18 (1967).

In contending that any error in the admission of the Henry evidence would be harmless even under the *Chapman* standard, the Government relies on the identification of petitioner by three witnesses, Messer, Pichardo, and Rosario, coupled with circumstantial evidence that allegedly connected petitioner to the white Volkswagen seen in the town of Frederiksted shortly before the robbery of the First Pennsylvania Bank.

2. *Chapman* places the burden on the government to demonstrate beyond a reasonable doubt that the admis-

sion of the Vena Henry evidence was harmless. In making this determination the reviewing court should guard "against giving too much emphasis to 'overwhelming' evidence of guilt." *Harrington* v. *California*, 395 U.S. 250,254 (1969). For an error of constitutional magnitude to be declared harmless, it "must have made *no* contribution to a criminal conviction." Id. at 255 (J. Brennan, dissenting) (emphasis in original).

3. The Government lays great emphasis on the eyewitness identifications of Messer, Pichardo, and Rosario. However, as this Court has noted "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States* v. *Wade*, 388 U.S. 218, 228 (1967). The circumstances surrounding both the initial observation of the robber by Messer, Pichardo, and Rosario and the events occurring at the time of the pretrial identification of the petitioner strongly counsel against summarily concluding that the evidence was "overwhelming" against petitioner.

4. The Government argues that Messer testified that he had a "clear recollection". Similarly, Pichardo told the jury that she "would never forget those looks".[8] Petitioner suggests that the focus in the harmless error analysis should be more on the circumstances surrounding the observations of the witnesses rather than on Messer and

[8] The Government also characterizes the identification of petitioner by Rosario, Pichardo's daughter, as "unequivocal". (Br. Resp. 42). Rosario merely identified petitioner when asked if she saw the individual who drove the van into her yard that morning in the courtroom. There is nothing in the record to support any conclusion as to Rosario's degree of certainty or confidence in this identification, as opposed to the testimony of Messer and Pichardo cited above. (Tr. 9-23&24: 15-16).

Pichardo's self-serving statements of infallibility. In *Neil* v. *Biggers*, 409 U.S. 188 (1972), this Court noted that one of the factors to be considered in evaluating the reliability of eyewitness identification evidence is the degree of confidence the witness expressed at any *pretrial* identification procedure involving the defendant. The degree of confidence expressed at the pretrial confrontation is a factor distinctly more important than that expressed at trial since "it is a matter of common experience that once a witness has picked out the accused at the line-up he is not likely to go back on his word later on." *United States* v. *Wade*, 388 U.S. at 229, quoting Williams & Hammelmann, *Identification Parades*, Part I, Crim. L. Rev. 479,482 (1963). Further, numerous studies have shown that there is little empirical correlation between the confidence expressed by an eyewitness in his or her identification and the accuracy of that identification. A. Yarmey, THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION, 150-151 (1979); Leippe, *Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence*, Journal of Law and Human Behavior, v.4, n.4, 261 (1980); Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?* Journal of Law and Human Behavior, v.4, n.4, 243 (1980).

5. Though offering differing explanations for their failures to identify petitioner when presented with various pretrial opportunities, nonetheless the fact remains each of the three eyewitnesses did in fact fail to make such identification when presented with the opportunity. All three witnesses failed to identify petitioner in a lineup held approximately 4 weeks after the robbery. (Tr. 9-22: 207-210,227-232 (Messer); Tr. 9-23: 254-256,265-269 (Pichardo); Tr. 9-23&24:13-15,25-31 (Rosario)). Messer

did not identify petitioner in the lineup because he was "frightened" and because of petitioner's "slick hair style and weight loss" (Tr. 9-22:231-22). Pichardo and Rosario also offered fright as their explanation for not picking petitioner in the lineup. Both Pichardo and her daughter testified that they were scared because they had seen a movie on television where one of the participants in a lineup had "jumped through the glass" and then shot the witnesses. (Tr. 9-22:254-55 (Pichardo); Tr. 9-23&24:14 (Rosario)).

Several factors detracted from these attempted explanations for the failure to identify petitioner in the lineup. Each of the witnesses admitted that there were several police officers in the lineup room in addition to an Assistant United States Attorney and attorney for petitioner. They were told that the lineup was done with a one-way mirror and thus presumably the participants therein could not view the witnesses. (Tr. 9-22:228-231, 265-269). The purported explanations based on fear dramatically contrasted with and were called into question by the testimony concerning their alleged responses during the encounter with the robber. Thus, Messer who was too "frightened" to identify the bank robber in the relative safety of the police station when flanked by several law enforcement officials, nonetheless, while unarmed, entered his vehicle and gave chase to the armed individual who he had just seen rob a bank and commandeer a taxi van by dragging its driver from the vehicle. (Tr. 9-22:186-196). Similarly, Pichardo, allegedly too afraid to make an identification because of the obviously fictionalized television movie, had had the nerve to holler "you son of a bitch" when the stranger in the taxi van drove into her yard.[9] (Tr. 9-22:242).

[9] In addition, Pichardo and Rosario's consistent explanation based on the television movie had the earmarks of collusion, most probably brought about by the mother-daughter relationship. This possibility was buttressed by their admission that Rosario had not identified petitioner in an earlier photospread because her mother had told her not to get involved. (Tr. 9-22:252; 9-23&24:13).

In addition to the lineup failures, both Pichardo and Rosario failed to identify petitioner in at least one photographic spread shown to them. (Tr. 9-22:252-254 (Pichardo); 9-23&24:12-13,25 (Rosario)). While both had explanations for not picking petitioner's picture ("not wanting to get involved"), nevertheless for purposes of harmless error analysis, as opposed to a sufficiency-of-the-evidence inquiry, their failures to identify petitioner when presented with earlier opportunities belie the Government's contention that the evidence should be characterized as "overwhelming" because of the eyewitness testimony.[10]

6. As this Court has recognized, "the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial . . ." *United States* v. *Wade*, 388 U.S. at 229. "Any emotion, such as extreme fright, experienced by the witness during the criminal ordeal . . . ought to be weighed carefully." *United States* v. *Smith*, 563 F.2d 1361, 1363 (9th Cir. 1977). "The identification of strangers is proverbially untrustworthy." Frankfurter, THE CASE OF

[10] In addition to the above the defense called John Chamble, the attorney who had been appointed to represent petitioner at the lineup conducted on August 12th. Chamble testified that contrary to the assertions of Messer, Pichardo, and Rosario, each appeared calm at the lineup and none either exhibited or expressed any fear or hesitancy. Chamble also testified that despite Pichardo's contrary assertions, she never placed her hands over her face during the lineup. (Tr. 9-23&24:142-149,152).

SACCO AND VANZETTI 309 (1927), quoted in *United States* v. *Wade*, 388 U.S. at 228.

These principles, as applied to the circumstances in this case, caution against placing undue reliance on the mere fact these witnesses identified petitioner in the courtroom. First, there was no indication that either Pichardo, Rosario, or Messer had ever seen petitioner prior to the day of the bank robbery. Messer, the only one of the three identification witnesses who had been at the bank, testified that when the masked robber ran out into the street he, Messer, was standing behind a pillar in front of a building on the other side of the street. From this location he saw the robber, still masked, commandeer the taxi van. While the robber was driving the van away Messer observed the robber removing the mask. The robber removed the mask only up to his forehead. While Messer testified that he was "looking for a feature or face or something like that," the fact remains that nowhere in Messer's testimony does he describe any particular facial feature of the person he observed. Messer admitted he was frightened during the incident. Finally, Messer indicates that he saw the robber removing the mask as the vehicle moved down the street for a period of time which he estimates as from *one to four seconds*. (Tr. 9-22:190-195,233).

Pichardo and Rosario's identifications are also based on less than ideal circumstances. Pichardo viewed the man who drove into her yard for about thirty seconds through a louvered window, where she sat sewing. She did not see the direction the man ran. (Tr. 9-22: 242,250,258-259, 271). Rosario, viewing the man from another room in the house as he stuck his head out of the van to see who called him a "son-of-a-bitch", estimated that she saw him for approximately 15 seconds. (Tr. 9-23&24:4-5). She also did

not see where the man went. (Tr. 9-23&24:6). These observations were apparently, like Messer's, made while the taxi van was moving, as it did not stop in the Pichardo yard. (Tr. 9-23&24:33).

7. Finally, the circumstantial evidence relied upon by the Government to corroborate the identification testimony is unsubstantial without the Henry evidence. The Government contends that even without this evidence, it was proven that petitioner had borrowed "*the* white Volkswagen" (emphasis added), that "it" was occupied by someone matching petitioner's description on the morning of the robbery, and that "it" was present in the vicinity of the bank near the time of the robbery. (Br. Resp. 43). A close review of the record indicates that the Government has overstated the evidence in this regard. Phillip Tutein, a friend of petitioner's, testified that Petitioner had borrowed Tutein's white Volkswagen on a day near the time of the robbery. "White Volkswagen" was the only description given. Tutein could not recall the license number of the vehicle, (Tr. 9-23&24:37-38), but Anthon Christian, a policeman, testified that he saw a white Volkswagen at approximately 9 a.m. stalled on the side of Mahogany Road.[11] Anthon Christian recorded the license number and forwarded it to Officer Zurita who was then led to Tutein. This, coupled with the general description given by Anthon Christian of one of the occupants of the vehicle, could reasonably have lead the jury to believe that the petitioner was in Tutein's white Volkswagen on Mahogany Road near the town of Frederiksted some five and one-half hours prior to the robbery. However, in the absence of the connection between Delroy Christian and petitioner,

[11] Mahogany Road is near the town of Frederiksted. (Tr. 9-23&24:54).

supplied by the Vena Henry evidence, there is no connection between the Tutein vehicle seen near Frederiksted five and one-half hours before the robbery and the white Volkswagen seen by Officer Anita Christian in the town of Frederiksted near the time of the robbery. Officer Anita Christian only described this vehicle as a "white Volkswagen." No license number was recorded and, without the Delroy Christian—petitioner connection, there is no evidence otherwise tying this vehicle to petitioner.

8. In this case there is additional objective evidence concerning the effect of the erroneously admitted Henry evidence. The petitioner's first trial for bank robbery without the Henry evidence resulted in a hung jury. The petitioner was convicted at a second trial, again without the Henry evidence. However, that conviction was reversed because of the strong possibility the jury was biased. *Government of the Virgin Islands* v. *Dowling*, 814 F.2d 134 (3d Cir. 1987). Thus, in the only prior trial with an unbiased jury where the Henry evidence was not introduced, the jury was unable to reach a verdict as to petitioner's guilt.

9. Petitioner concedes that the evidence introduced by the Government was sufficient to withstand a sufficiency-of-the-evidence attack. However, decisions of this Court make it clear that the harmless error analysis is distinct from the sufficiency inquiry. See *United States* v. *Lane*, 106 S.Ct. 725 (1986); *Kotteakos* v. *United States*, 328 U.S. 750 (1946). *Kotteakos* requires an "examination of the proceedings in their entirety." 328 U.S. at 762. Petitioner submits that when the evidence in this case is "examined in its entirety" the Government has been unable to sustain its burden of demonstrating that the

admission of the Vena Henry evidence was harmless beyond a reasonable doubt.

Respectfully submitted,

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